United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1386

To be argued by
ROBERT B. HEMLEY

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1386

UNITED STATES OF AMERICA,
Appellee,

—v.—

ARTHUR G. SCHUFFMAN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ROBERT B. HEMLEY,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys, Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1386

UNITED STATES OF AMERICA,

Appellee,

—v.—

ARTHUR G. SCHUFFMAN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Arthur G. Schuffman appeals from a judgment of conviction entered on November 7, 1975, in the United States District Court for the Southern District of New York, after a six day trial before the Honorable Edward Weinfeld, United States District Judge, and a jury.

Indictment 75 Cr. 506, filed May 27, 1975, charged in Counts One through Thirty that Schuffman devised a scheme to defraud prospective investors in scotch whisky warehouse receipts by means of false and misleading statements concerning the value of such an investment and its profit potential, and that he used the United States mails in furtherance of the scheme, in violation of Title 18, United States Code, Section 1341.

Trial commenced on September 29, 1975 and concluded on October 6, 1975 with guilty verdicts on each of the

twenty-nine counts that were ultimately submitted to the jury.*

On November 7, 1975, Schuffman was sentenced to a term of two years' imprisonment on each count, eighteen months of which was suspended, the remaining six months to be served in a jail-type institution, followed by a two year parole term. The sentences were to run concurrently.

Schuffman is presently at liberty pending this appeal.

Statement of Facts

The Government's Case

A. The formation of Perthshire Scotch Whisky, Ltd.

On April 12, 1973, Schuffman, as incorporator, caused a Certificate of Incorporation for Perthshire Scotch Whisky ("Perthshire"), to be filed with the Department of State of the State of New York. (GX 1). On the same day, Schuffman, in the company of a second man proceeded to the offices of the Park South Control Company, where, in his capacity as President of Perthshire, Schuffman signed a one year lease for office space at 386 Park Avenue South. (Tr. 580-82; GX 250).** On April 18, 1973, Schuffman arranged for the installation of three telephone lines in an apartment he occupied at 1701 York Avenue, New York, New York, and on April 23, 1973,

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* Count Ten was dismissed by the Court with the Government's consent at the conclusion of the Government's case (Tr. 711-12). "Tr." refers to the trial transcript; "GX" to Government exhibits; "DX" to defendant's exhibits; and "Br." to Schuffman's brief on appeal.

** During the defense case, Schuffman admitted that he was not only the President and incorporator of Perthshire, but that he was also the sole shareholder, director and officer (Tr. 919-20).

for the installation of two telephone lines at the Perthshire office. (Tr. 513-14, 516; GX 253-55). To finalize preparations for the commencement of Perthshire's business, Schuffman on April 19, 1973 opened two corporate bank accounts at the Chase Manhattan Bank—a regular account and a so-called "special account"—as to both of which only Schuffman was authorized to make withdrawals. (Tr. 84-90; GX 236-41). He then hired two secretaries, first Barbara Antonucci, and several weeks later, Gloria Bjorkstrom. (Tr. 103; 538-39).

B. The operation of the business

Shortly after its establishment, Perthshire began to promote and sell Scotch whisky warehouse receipts to investors throughout the United States. These receipts represented title to casks of blended scotch whisky lying in bonded warehouses in the United Kingdom.

The methods employed in the sales campaign were not always uniform, but most often the prospective investor, randomly selected from a mailing list, first received an unsolicited flyer that described the benefits of scotch whisky investments and had an attached coupon to be returned to Perthshire if further information were desired. (Tr. 109; 552; GX 4).* The flyer, among other attractive statements, touted investments in scotch whisky warehouse receipts as "a new low-risk-high-profit opportunity." **

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* Seventeen victims of the scheme testified for the Government, not all of whom recalled receiving the flyer as their first contact with Perthshire. Two victims said they first received an unsolicited telephone call from Schuffman (Tr. 35, 318), and five said they responded to newspaper or magazine advertisements (Tr. 339, 397, 412, 450, 480).

** James B. Thome, an expert in the blending and brokerage of scotch whisky, offered his uncontroverted opinion that this

[Footnote continued on following page]

When the coupon was returned, Schuffman caused a promotional booklet to be mailed out further touting an investment in scotch whisky as secure and profitable. (GX 3; Tr. 110-2, 552). The covering letter which accompanied this booklet, as well as the initial flyer itself, were signed "Michael McDaniel, Advertising Director." No person by that name or job description was actually employed by Perthshire. (Tr. 112-15; 546-47).*

Shortly after the booklet was mailed, a hard sell telephone call was made by Perthshire salesmen, variously identifying themselves as Arthur Schuffman, John Gordon, Jim Tyler, Mike Baxter, John Cook or Ray Richardson, in which the prospective customer was offered a specific lot of six year old White Abbey Blend scotch whisky at a price of $6.80 per gallon. The customer was falsely advised, among other things, that there was only a limited supply of White Abbey Blend; that he could expect a return of up to 50% on his investment after holding the whisky for two years; that in some cases Perthshire guarantees a profit of almost $2.00 per gallon; and that Perthshire would assist in disposing of the whisky. (Tr. 35, 43, 62, 66, 188-90, 219, 239, 258, 261, 279, 282, 294,

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and other promotional statements published by Schuffman were flatly false both as to general matters and specifically as to the "White Abbey Blend" Perthshire offered for sale (Tr. 636-40).

* This covering letter, and others signed by "Thomas Patterson, Director", another imaginary Perthshire employee, were typed by the secretaries from handwritten sheets of paper handed to them by Schuffman (Gx 10, 11, 16; Tr. 112-121). During the defense case, Schuffman admitted that Michael McDaniel and the other persons variously described as Perthshire executives and employees, were fictitious (Tr. 948-50, 970). Nevertheless, in June, 1973, when a New York State Assistant Attorney General who was investigating possible fraud and securities violations committed by Perthshire, inquired as to the whereabouts of Michael McDaniel, Schuffman falsely responded: "He no longer works here" (Tr. 975).

297, 319-20, 322, 341-42, 344, 364-65, 371-72, 397-98, 413, 419, 451, 454, 456-58, 468, 472, 481, 485-86, 497, 501).* When an order was placed, it was immediately confirmed by a letter, sent at Schuffman's direction and signed by a fictitious "Mr. Patterson" instructing the purchaser to send payment to Perthshire's "Special Account" at the Chase Manhattan Bank. (GX 11-12; Tr. 115-21, 548-50). On a regular basis, one of the Perthshire secretaries would check with the bank to ascertain if any deposits had been made. (Tr. 92-93). Thereafter, as they had been instructed by Schuffman, the secretaries would send the purchaser a form that deceptively appeared to have been issued by the bank itself, acknowledging that Perthshire had received the funds. (Tr. 121, 265, 328, 349, 549-50). This confirmation of deposit was then followed by an invoice, actually signed by Schuffman, which gave the purchaser specific information as to the numbers and location in the United Kingdom of the barrels of whisky for which he was receiving title. (GX 16).

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* New York Telephone Company records revealed that these calls were charged to Perthshire's office telephone at 386 Park Avenue South but were not made from that location. They were usually made from another New York City location, from Canoga Park, California, or from Reseda, California (GX 252). On the dates the calls from Canoga Park were made, Schuffman was registered, along with two others, as the occupant of three rooms in a Holiday Inn in that city (GX 256-59; Tr. 530-32). His permanent residence at all relevant times was in Reseda. During the defense case, Schuffman admitted the New York calls were made from the apartment he occupied at 1701 York Avenue and that some were made within his hearing, but he claimed that the calls were made by his two "partners" and not by him (Tr. 893-94, 926-30). He further admitted registering at the Holiday Inn in Canoga Park on the days in question, but again denied personally making the calls, or even overhearing them (Tr. 904, 923-924, 986). As to the calls from Reseda, where he acknowledged he resided, he had no explanation (Tr. 997, 1002-03).

Once on the Perthshire mailing list, prospective investors received additional Perthshire promotional material which Schuffman helped prepare and which was sent out with his knowledge. (GX 5-9, DX C; Tr. 810, 877). This material contained false and misleading statements about scotch whisky investments, and one item, which appeared to be a verbatim reprint of an objective article from "Nation's Business" magazine, was edited to delete all reference to the speculative and risky nature of investments in scotch whisky. (DX C, J).

Those investors who took the bait and purchased a quantity of White Abbey Blend were almost always telephoned several weeks later by a Perthshire representative and offered the opportunity to purchase additional whisky. In this second call the investor was told he was being given a rare opportunity to buy seven year old whisky which could be sold after only a one year holding period for the same high, guaranteed profits. (Tr. 43, 66-67, 261, 282, 297, 322, 344, 371-72, 419, 456-58, 472, 485-86, 501). A number of investors made additional purchases. All the purchasers relied on both the oral and written representations made to them by Perthshire, and some also relied on the apparent involvement and reputation of the Chase Manhattan Bank. None would have invested absent Perthshire's representations. (Tr. 45-46, 68-69, 193, 224-25, 246, 265-66, 282-84, 299-300, 327-28, 345-46, 372-73, 402-03, 430-32, 459, 473, 486-87, 503).

C. White Abbey Blend and the scotch whisky market

The warehouse receipts sold by Perthshire vested the purchaser with title to various amounts of White Abbey Blend whisky in lots of from 125 to 1000 gallons. In all but one instance, investors paid $6.80 per gallon. (GX 20, 26, 35, 50, 73, 79, 88, 94, 101, 114, 121, 127, 137, 157, 167,

188, 193, 200, 204, 212, 218, 225, 230).* Schuffman had arranged to purchase the whisky from a London concern, H. Ost & Sons, at prices ranging from $1.92 per gallon to $2.16 per gallon (GX 245-49; Tr. 589-94). Contrary to Perthshire's representations, White Abbey Blend was not a well known label (Tr. 632); there was at all times an inexhaustible supply of White Abbey Blend (Tr. 594); blended whisky was and is of little use to distillers who produce an established label (Tr. 628); blenders are likely to pay even less than the market value for whisky sold in the relatively small quantities held by Perthshire investors (Tr. 632-33); blended scotch whisky does not generally increase in value as it ages (Tr. 636); and the market prices of blended scotch whisky have been generally depressed since 1965. (Tr. 629).**

D. The closing of Perthshire

During the time of Perthshire's existence, $112,723.59 was delivered by various investors into Perthshire's "Special Account" at Chase Manhattan. (Tr. 96; GX 243). Of these funds, which were transferred into the Perthshire regular checking account, Schuffman wrote checks to himself in the amount of $49,526.63 and drew checks to cash which he endorsed totalling $2,177.47. (Tr. 96-97; GX 244). Schuffman closed out both accounts on October 15, 1973, approximately five months after they were opened. (Tr. 89-90; GX 238-41). The telephones at the

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* One purchaser, Dale Lowe, a funeral director from Campbellsville, Kentucky, paid $7.60 per gallon for "seven year old White Abbey Blend" (Tr. 67).

** The White Abbey Blend which Perthshire sold in 1973 at $6.80 per gallon and for which it predicted profits of up to 50% after two years, had dropped precipitously from its true 1973 market price of approximately $2.00 per gallon and was selling for roughly 85 cents per gallon at the time of the trial (Tr. 634).

York Avenue apartment were disconnected on July 20, 1973. (Tr. 518; GX 254). The telephones at Perthshire's offices at 386 Park Avenue South were disconnected on October 16, 1973, at which time the telephone company indicated on its records "possible abandonment." (Tr. 516-17; GX 253). Perthshire did not fulfill its one year lease at 386 Park Avenue South, abandoning the office and its contents sometime prior to October 19, 1973. (Tr. 583, 586-87; GX 264).

Despite the representations made to investors that Perthshire would assist them in the sale of the whisky they had purchased, Schuffman made no effort to notify them of the discontinuance of Perthshire's operations. When investors sought to contact Perthshire as the end of the suggested holding period of the whisky approached, they found that their letters were returned unopened and their telephone calls went unanswered. (Tr. 46, 69, 194, 223-24, 245-46, 264-65, 300, 326-27, 373-74, 409, 422-23, 489, 504).

The Defense Case

Schuffman testified on his own behalf and called as witnesses his wife, the attorney who had helped to establish Perthshire, the accountant who prepared its corporate tax returns, and the manager of an answering service he engaged after Perthshire ceased its operations.

According to his testimony, Schuffman, who had no prior experience in the whisky business and no expertise in the field, was asked by his friend Isaac Silver to join him and another friend, Ronald Pepperman, in a business venture selling scotch whisky warehouse receipts. (Tr. 855-57). After discussing the proposition with his wife, Schuffman left his job at Marbel, Ltd. in

March 1973 and proceeded to New York for the purpose of establishing Perthshire.*

In New York, on April 12, 1973, Schuffman went with Silver to the office of Andrew Gore, an attorney, for the purpose of signing the incorporation papers and seeking advice as to whether it was necessary to register with the Securities and Exchange Commission. (Tr. 722, 729, 743). Schuffman and Silver provided Gore with a proof of the promotional booklet they planned to use, and he reviewed it, again only with respect to whether it might create a registration problem. (GX 3; Tr. 723-24, 729, 743-44). On either that occasion, or shortly thereafter, Schuffman asked Gore to review other Perthshire promotional material and gave him a series of magazine articles concerning scotch whisky investments, which, together with his conversations with Schuffman and Silver, formed the sole source of Gore's knowledge of the business. (Tr. 726, 729, [illegible]4, 877-81; DX G-Y).

Although Schuffman plainly sought to rely on an advise of counsel defense it was entirely clear that, as with the booklet, Gore's only concern and advice related to whether the additional material presented a registration problem. (Tr. 729). Gore was never asked, and never gave any advice, as to whether the representations made by Perthshire in the brochures were fraudulent. (Tr. 768). Gore was never consulted about the representations made in the telephone calls. (Tr. 748). He advised Schuffman that he could use a name other than his own if he feared "that with a Jewish name he couldn't get business," but never approved of the inven-

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* Though he claimed his involvement in the whisky business was entirely open and innocent, Schuffman told his associate at Marbel that he was going back east to promote the sale of false eyelashes that had been developed by his wife (Tr. 1019).

tion of non-existent titles or positions or of the use of a series of false names. (Tr. 746-48, 759-61).*

Moreover, Gore was never advised of many of the relevant facts concerning Perthshire's deceptive operations. Among other things, he was not informed that Perthshire was purchasing whisky for $2 per gallon, selling it for $6.80 per gallon and representing it to have a potential value of $10 or $11 per gallon (Tr. 749); that contrary to the representations in Perthshire's promotional materials there were no experts associated with the company (Tr. 749-50);** or that Perthshire would misrepresent the age and amount of whisky sold. (Tr. 762).***

Schuffman also sought to minimize his involvement in this scheme. Schuffman's primary job, he claimed, was to run the office while Silver and Pepperman handled the sales. (Tr. 892-95). Even though Schuffman admitted opening and operating the bank account (Tr. 884-85), signing the checks in payment for the whisky (Tr. 921-922), participating in every one of Perthshire's management decisions (Tr. 920), handling the disbursement of funds to himself and his partners (Tr. 916), participating in conferences with Mr. Gore (Tr. 716), knowing the statements being published in the written material were false (Tr. 952-54), overhearing the telephone sales pitch (Tr. 926-30), and knowing fictitious names were being used (Tr. 948-950), he maintained

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* Despite the concern Schuffman said he had about the effect of his true name on his ability to get business for Perthshire, Schuffman did sign at least one form letter to investors with his real name, among the others signed by the fictitious (and curiously Scottish sounding) Micnael McDaniel and Thomas Patterson (GX 10, 11, 16).

** The closest thing to an expert at Perthshire was Henry Ost, in London, who supplied the whisky and who was only in occasional contact with the company (Tr. 953-54).

*** The age and quantity of the whisky sold to John White was blatantly misrepresented (Tr. 422-30).

that during the operation of Perthshire he relied totally on Pepperman, Silver and Gore, and was unaware of any fraud (Tr. 875-76, 894). According to Schuffman, Pepperman and Silver were purposefully kept in the background only to conceal their participation in the whisky business from a former employer, and not for any other reason. (Tr. 1010-12). That was also Schuffman's explanation as to why these men were always paid in cash by Schuffman and did not even disclose their affiliation with Perthshire on their federal income tax returns. (Tr. 917).

From April through June, 1973, Schuffman was only in New York on a part time basis, he alleged, and spent about half his time in California for personal reasons. During the period of his absence, Schuffman claimed he stayed in touch with Silver, but did not otherwise conduct Perthshire business. (Tr. 888-92, 895-96, 900-01).

Schuffman also attempted to claim that Perthshire was not closed down because of any fear of criminal and civil suits, but only because of a concern about SEC registration. It was in October, 1973, only after receiving Gore's advice that a recent court decision required Perthshire to register with the SEC, that Schuffman and his partners decided, he claimed, to dissolve the company. But on June 15, 1973, the Attorney General of the State of New York had served a *subpoena duces tecum* upon Schuffman and the Perthshire secretaries in connection with an investigation of possible violations of New York State's securities laws, the *Martin Act, New York State General Business Law* §§ 352ff (McKinney's 1968). (Tr. 765, 767, 897-99). It was at this time, when the Assistant Attorney General inquired of the fictitious Michael McDaniel's whereabouts that Schuffman responded: "He no longer works here." (Tr. 975). Shortly thereafter, Schuffman removed certain files from the office. (Tr. 126-30). In a legal action to quash these

subpoenas, repeated charges were made by the Attorney General both in papers and in open court, that Perthshire's advertising was fraudulent. (Tr. 768-70). Despite the pendency of these proceedings and the fact that the *Martin Act* contains virtually the same language as the federal mail fraud statute, Gore and Schuffman both maintained *their only concern* was the technical registration requirements and that the possibility of civil and criminal fraud charges never entered into their decision to close Perthshire. Perthshire's business records mysteriously disappeared shortly thereafter. (Tr. 899, 905-07, 936-39).

Isaac Silver and Ronald Pepperman, the men Schuffman sought to portray as silent partners and the real culprits in this scheme, were not called as defense witnesses—hostile, as they might have been, or otherwise.

ARGUMENT

POINT I

The trial court properly denied Schuffman's pretrial motion for leave to depose Maureen Quinn in London.

Schuffman contends that he was deprived of a fair trial when Judge Weinfeld denied his motion for leave to take the deposition of Maureen Quinn, secretary to the London concern which supplied Perthshire with the whisky it resold to American investors. This contention is frivolous. Not only was the court's decision entirely correct, but whatever arguments might possibly have been raised to challenge it were surely mooted by Mrs. Quinn's appearance at trial as a Government witness and her availability to Schuffman for cross-examination. (Tr. 588-623).

As perhaps explained by Mrs. Quinn's appearance at trial, Schuffman utterly failed in his motion papers and at the hearing held on July 22, 1975, to establish the necessary prerequisite for a deposition then applicable under Fed. R. Crim. P. 15(a), that the prospective witness "may be unable to attend or prevented from attending" the trial.* See *United States* v. *Birrell*, 276 F. Supp. 798, 822-23 (S.D.N.Y. 1967), *cited with approval in*, *United States* v. *Rosenstein*, 474 F.2d 705, 715 (2d Cir. 1973). Moreover, as Judge Weinfeld observed in denying the motion, Schuffman failed to establish either the alleged nature of the testimony that he anticipated Mrs. Quinn would give, its materiality, or that it would help to establish the claimed defense of good faith, all necessary elements of a successful motion for a pre-trial deposition. (Tr. of 7/22/75 hearing, at 10-11). See *e.g.*, *United States* v. *Whiting*, 308 F.2d 537, 541 (2d Cir. 1962), *cert. denied*, 372 U.S. 909 (1963); *United States* v. *Broker*, 246 F.2d 328, 329 (2d Cir.), *cert. denied*, 355 U.S. 837 (1957); *United States* v. *Bronston*, 321 F. Supp. 1270 (S.D.N.Y. 1971).

The only claim of prejudice raised by Schuffman with respect to denial of this motion is his illogical and inaccurate assertion that his inability to depose Mrs. Quinn "paved the way to an in court identification based on a very possibly tainted prior photographic identification of the appellant by witness Quinn upon which the trial court not only disallowed defense counsel cross-examination, but ignored what should have been the Court's duty, to suggest an immediate hearing within the trial. . ." (Br. at 34). As was developed during the full and uninterrupted cross-examination of Mrs. Quinn on this point, and in a letter that had been delivered to Schuffman and the court the day before Mrs. Quinn took the stand, the procedure

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* Fed. R. Crim. P. 15(a) was amended, effective December 1, 1975.

through which Mrs. Quinn made the out of court identification of which Schuffman complains was not improperly suggestive, and her in court identification was accordingly untainted. (Tr. 602-06).

The letter provided:

> "This is to advise you that on September 29, 1975, in the presence of me (Government counsel) and Inspector Slavinski, Mrs. Maureen Quinn, who will be called as a Government witness, was shown a spread of five photographs, one of which was a photograph of the defendant, Arthur G. Schuffman. Mrs. Quinn was unable to positively identify any of the photographs as depicting the defendant, and chose a photograph of Aniello Dellacroce as looking "something like him." Thereafter, Mr. Slavinski drove Mrs. Quinn to her hotel. Without telling her where they were going or who they were meeting, Mr. Slavinski drove first to meet you, as arranged, on the corner of Fifth Avenue and 40th Street, New York, New York, to deliver certain documents to you. Upon arriving at that location, and without any conversation taking place between Mr. Slavinski and Mrs. Quinn, Mrs. Quinn volunteered that she was sure the man standing on the corner was the defendant, Arthur Schuffman, which it was."

At no time after the receipt of this letter or during trial did Schuffman request a hearing. Nor did he object at trial to the in court identification. Since his objection is being raised for the first time on this appeal, relief is foreclosed to him. Fed. R. Crim. P. 52(a). But even assuming this Court might in some circumstances treat such a claim as "plain error," it is entirely clear that here there is no merit whatsoever to the

claim raised and that counsel's failure to object below or request a hearing was indicative of his perception of the insubstantiality of this issue. Prior to trial Mrs. Quinn was shown a display of photographs and she was asked if she recognized any of the persons depicted. (Tr. 605). This could hardly be termed a suggestive procedure. Thereafter, fortuitously, as she was being driven back to her hotel from the courthouse on September 29, 1975, Mrs. Quinn spotted Schuffman on a street corner among some other people, and volunteered the identification to the Postal Inspector who accompanied her. (Tr. 606). Again, this was not suggestive; indeed, it is difficult to conceive of a less suggestive setting than a New York City street corner. Moreover, Mrs. Quinn testified that she had seen Schuffman in London on four separate occasions and was "absolutely certain" of her in court identification. (Tr. 603). Accordingly, Schuffman could not possibly satisfy either of the two prongs of the test required by *Simmons* v. *United States*, 390 U.S. 377, 384 (1968): that the initial identification procedure was impermissibly suggestive and that, under the totality of the circumstances, the procedure gave "rise to a very substantial likelihood of irreparable misidentification." *United States er rel. Hines* v. *LaVallee*, 521 F.2d 1109 (2d Cir. 1975); *United States* v. *Tramunti*, 513 F.2d 1087, 1116 (2d Cir. 1975); *United States ex rel. John* v. *Casscles*, 489 F.2d 20 (2d Cir. 1973); *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 914-15 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970). Moreover, defense counsel exploited his opportunity to bring any of the charges of misidentification to the attention of the jury. See *United States* v. *Yanishefsky*, 500 F.2d 1327, 1331 (2d Cir. 1974).

POINT II

There was sufficient evidence to support Schuffman's conviction.

Schuffman contends that the evidence produced was insufficient to support a finding by the jury that there was a scheme to defraud or that he devised or participated in it. To the contrary, the proof on these points was overwhelming.*

The scheme to defraud consisted of making false and misleading statements, both in Perthshire's promotional materials and during telephone calls with prospective investors, concerning the investment value of scotch whisky in general and White Abbey Blend in particular, and of misrepresenting Perthshire's expertise in the field for the purpose of persuading prospective investors to make purchases from Perthshire. Perthshire's sales program contained some outright falsehoods and failed to state other facts which were material to the potential investors and which fairly should have been disclosed.

Among the outright falsehoods contained in Perthshire's promotional materials were the following:

1) ". . . if you are like our present clients, it (scotch whisky investments) will open up for you as it has done for them, *a new low-risk-high-profit opportunity.*" (GX 4).

2) "Tens of thousands of Americans have found a new way to investment profits through the purchase and re-sale of maturing Scotch Whisky. Many are clients of Perthshire

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* After a six day trial resulting in over 1100 pages of transcript, the jury deliberated less than two hours and sent in no notes before convicting on each of the twenty-nine counts submitted to it. (Tr. 1157).

Scotch Whisky, Ltd. of New York, specialists in the long established market." (GX 3, inside cover).

3) "Like a masterpiece of art or a rare antique scotch whisky appreciates in value as it ages." (GX 3, cover page).

4) "Profit potential in this program is based on the economic fact that SCOTCH WHISKY INCREASES IN CASH VALUE AS IT MATURES IN AGE." (GX 3, p. 10).*

None of Perthshire's clients ever made a profit; no one at Perthshire had any expertise whatsoever; and it is untrue that scotch whisky necessarily increases in value as it matures. (Tr. 636, 951-52).**

Additionally, Perthshire's booklet contained a chart describing "Four-Year Gain of 109% with Scotch Grain," an example of a successful investment made during the rising market from 1960 to 1964, but which was entirely unrelated to the continuous decline the market had suffered since 1965. (GX 3, p. 5; GX 284-285; Tr. 638-39). A second chart contained in Perthshire's booklet showed recent profits in malt whisky, a totally different commodity from the blended whisky Perthshire was selling (GX 3, p. 8; Tr. 638-39). A magazine article which

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* These outright falsehoods are apparently among those which Schuffman has characterized in his brief on appeal as "minor mis-statements that were involved in the literature." (Br. 42).

** The true market price of White Abbey Blend declined, from roughly $2.00 per gallon in 1973 to 85¢ per gallon in 1975 (Tr. 634). All of those victims who had sold their whisky prior to trial testified to the substantial losses they sustained. This testimony, which Schuffman attacks as "highly inflammatory" (Br. 42), was plainly relevant to prove that a scheme to defraud existed. See, *e.g.*, *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970).

Perthshire distributed to potential investors purported to be an objective analysis of scotch whisky investments endorsed by the U.S. Chamber of Commerce, but actually was carefully edited by Perthshire to delete all the unfavorable comments (DX C, J).

Further evidence of the scheme to defraud was that Perthshire used fictitious names and titles in its mailings such as Michael McDaniel, Advertising Director, and Thomas Patterson, Director, calculated to create the impression of a large, established company with Scottish ties.

Furthermore, whatever subtlety existed in the written misrepresentations vanished in the enthusiasm of the follow-up telephone calls. Therein prospective investors were told they could expect profits of up to 50% after holding the White Abbey Blend for two years; that in some cases profits were guaranteed; that there was only a limited supply of White Abbey Blend available; and that Perthshire would assist investors when the time came to dispose of the whisky. (Tr. 35, 43, 62, 66, 188-90, 219, 239, 258, 261, 279, 282, 294, 297, 319-20, 322, 341-42, 344, 364-65, 371-72, 397-98, 413, 419, 451, 456-58, 468, 472, 481, 485-86, 497, 501). The true facts were that the investors were being charged $6.80 per gallon for a whisky whose real value was at most $2.00 per gallon; that there was a virtually inexhaustible supply of the whisky available; and that Perthshire was at best a rather temporary set-up (Tr. 634-40).

Among the material facts that the investors were not told were: Perthshire was paying at most $2 per gallon for the whisky investors were buying at $6.80 per gallon; blended whisky is not readily saleable to reputable blenders at any price because its unknown content may contaminate a particular formula; small parcels of the size being sold by Perthshire were even more difficult to dispose of; and most significantly, the bottom had dropped

out of the grain and blended whisky markets in 1965. (Tr. 634-40).

The magnitude of these misrepresentations, calculated misimpressions, and failures to disclose surely demonstrated the existence of a scheme to defraud by any standard. See, *e.g.*, *Durland* v. *United States*, 161 U.S. 306 (1896); *United States* v. *Regent Office Supply Co.*, *supra*; *United States* v. *Andreadis*, 366 F.2d 423 (2d Cir. 1966).

Schuffman's knowledge of, and participation in, the fraud is similarly supported by abundant evidence. As sole officer, director, and stockholder, he participated in all of Perthshire's management decisions. (Tr. 920).* He conceded that he knew the representations contained in the written material were not true. (Tr. 952-54). He also knew fictitious names and titles were being used both in the written material as well as in the telephone calls. (Tr. 948-50).** In addition, he was aware that the price

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* Of course, since Schuffman offered evidence after the denial of his motion for acquittal at the close of the Government's case, he waived any claim as to the sufficiency of the Government's case evaluated alone. *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 n. 7 (2d Cir. 1973); *United States* v. *Acuri*, 405 F.2d 691, 695 n. 7 (2d Cir. 1968), *cert. denied*, 395 U.S 912 (1969).

** While there was no direct evidence that Schuffman placed any of the telephone calls himself, a substantial weight of circumstantial evidence dictated that conclusion. Schuffman arranged for the installation of three telephones in the York Avenue apartment he occupied with two others, and from which he admitted many of the calls were made. (Tr. 926-30). In a number of instances the caller identified himself as Arthur Schuffman. (Tr. 35, 318). Schuffman registered for three rooms at the Holiday Inn in Canoga Park, California on days when a number of calls were made from that location (Tr. 530-632; GX 256-59). After the Holiday Inn rooms were vacated, and before any other office space was occupied, a number of calls were made from Reseda, California, Schuffman's permanent residence and the location where he admitted being at the time. (Tr. 997, 1002-3; GX 252).

Perthshire paid for the whisky was less than one-third that which was being charged the investors. (Tr. 921-22). He paid his two partners in cash only, never obtained a receipt, and was aware they were not reporting their profit on their income tax returns. (Tr. 917). After he was served with a subpoena calling for the production of Perthshire's records, he removed certain of them from the office. (Tr. 126-30). He deliberately misled the Assistant Attorney General who asked him where Michael McDaniel was. (Tr. 975). He concealed the fact that he was going into the whisky business, telling his former colleague he was going to New York to develop a false eyelash business. (Tr. 1019). He never notified any of the investors that Perthshire was planning to, or did go out of business.

In short, the record can fairly be said to wreak of direct evidence of Schuffman's participation in this unlawful scheme. The jury was clearly justified in concluding from the evidence that he had knowledge of the fraud or at the very least, a reckless disregard for whether the statements he was causing to be circulated were true. *United States* v. *Bright*, 517 F.2d 584 (2d Cir. 1975); *United States* v. *Brawer*, 482 F.2d 117, 128 (2d Cir. 1973); *United States* v. *Jacobs*, 475 F.2d 270, 287 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973).

POINT III

The trial court's conduct of the trial and its final instructions to the jury were entirely proper.

Schuffman complains that Judge Weinfeld unduly interfered with the fair conduct of the trial by instructing the jury on the issue of credibility during the course of the testimony of Perthshire's attorney and by declining to allow his trial counsel to question the victims of the scheme about the telephone interviews he con-

ducted with them in preparation for trial. Further, Schuffman argues that Judge Weinfeld's instructions to the jury on the issues of good faith, reliance on counsel and knowledge were erroneous. These contentions are meritless.

Rather than interfering in the conduct of the trial, Judge Weinfeld exhibited remarkable restraint during the examination of Perthshire's corporate counsel and was, if anything, overly protective of the defendant's interests.* The witness' evasive and unresponsive answers prompted the prosecutor on no less than four occasions to ask him to answer the questions put to him. (Tr. 750, 756, 757, 759). The court similarly twice cautioned the witness about his unresponsive answers. (Tr. 761, 762). Additionally, it was necessary for the court to instruct the witness not to discuss the attorney-client privilege in the presence of the jury (Tr. 718), to rule on a second novel privilege the witness attempted to advance to avoid answering (Tr. 788),** and to caution him not to volunteer statements when no questions were before him. (Tr. 761-62). It was in this context, after the witness had consumed four pages of testimony in attempting to avoid answering the simple question: "Did you know on October 11 that Mr. Schuffman had removed some of those

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* During the direct examination, when Schuffman's trial counsel appeared to be on the threshold of opening the door for damaging cross-examination into the nature of the New York State Attorney General's investigation of Perthshire, Judge Weinfeld asked: "Do you really want to go into that?" (Tr. 736). Trial counsel pressed forward only to object later when the anticipated line of cross-examination was pursued. The court was constrained to overrule the objection, but attempted to cut the damaging inquiry short even when further points were left to be made. (Tr. 778).

** In response to the question: "Did you tell Mr. Schuffman to preserve those records against the possibility of having to present them to the Attorney General?", Perthshire's corporate counsel responded that even though the attorney-client privilege had been waived, the answer would call upon him to disclose the content of a "'confidential" hearing before the Attorney General. (Tr. 778).

[Perthshire's] records from his office?", that Judge Weinfeld instructed the jury:

> "This is an instruction I will repeat again in the course of my formal instructions. You remember at the start of the trial, before a single word of testimony was heard, that I suggested you not only listen to what witnesses said, but also you observe their manner and conduct in testifying, their demeanor. Eventually when you are called upon to pass upon the credibility of witnesses—this applies to all witnesses—the circumstances under which he testified, the manner of testimony, may be considered by you in passing upon his credibility." **

Judge Weinfeld's instruction on credibility was fair and impartial and did not suggest the court's belief or disbelief of the witness. Moreover, in remarks made before the trial commenced and again in the final instructions, the court impressed upon the jury that the assessment of credibility was exclusively their province. (Tr. 4, 1118, 1119, 1149-51). These remarks were well within the district judge's "active responsibility to see that a criminal trial is fairly conducted." See *e.g.*, *United States* v. *De Sisto*, 289 F.2d 833, 834 (2d Cir. 1961); *United States* v. *Curcio*, 279 F.2d 681, 682 (2d Cir. 1960).

Similarly, the court's mild admonishment of Schuffman's trial counsel following the Government's objections to his utterly irrelevant and baseless questions of the victim witnesses about telephone interviews he had conducted with them was legally sound and well within the limits of permissible judicial involvement in a crimi-

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* The final straw which prompted the instruction came when the witness was asked for the fourth time if he knew the records had been removed, and he responded: "In my own head or as an attorney." (Tr. 786).

nal trial.* See *United States* v. *Kaylor*, 491 F.2d 1127, 1130 (2d Cir. 1973); *United States* v. *Boatner*, 478 F.2d 737, 740 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973); *United States* v. *Nazzaro*, 472 F.2d 302, 304 (2d Cir. 1973); *United States* v. *Cruz*, 455 F.2d 184, 185 (2d Cir. 1972); *United States* v. *DeSisto*, *supra*; *United States* v. *Curcio*, *supra*.

With respect to the judge's charge to the jury, it is sufficient to say that the instructions on the issues of good faith, reliance on counsel and reckless indifference, all generally complained of by Schuffman without reference to any specific language, faithfully followed the law in this Circuit and afforded Schuffman the benefit of an impartial evaluation of the evidence by the jury. *United States* v. *Regent Office Supply Co.*, *supra*; *United States* v. *Crosby*, 294 F.2d 928 (2d Cir.), *cert. denied*, 368 U.S. 984 (1961); *Harris* v. *United States*, 261 F.2d 792, 796 (9th Cir. 1958), *cert. denied*, 369 U.S. 933 (1959) (good faith); *Williamson* v. *United States*, 207 U.S. 425, 453 (1908); *United States* v. *Finance Committee to Re-Elect the President*, 507 F.2d 1194, 1198 (D.C. Cir. 1974); *United States* v. *Painter*, 314 F.2d 939, 943 (4th Cir. 1963) (reliance on advice of counsel); *United States* v. *Bright*, *supra*; *United States* v. *Brawer*, *supra*; *United States* v. *Jacobs*, *supra* (reckless indifference).

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* Typically, defense counsel would begin his cross-examination of the victims by inquiring into their telephone interviews with him without even suggesting or attempting to establish that there was anything inconsistent between the interviews and their trial testimony. This, of course, was improper. (Tr. 267-69). See, *e.g.*, *United States* v. *Cunningham*, 446 F.2d 194 (2d Cir.), *cert. denied*, 404 U.S. 950 (1971). Moreover, counsel's constant reference to his own participation in the conversation improperly injected the issue of counsel's own credibility into the case. Cf. *United States* v. *Alu*, 246 F.2d 29, 33-34 (2d Cir. 1957).

While Judge Weinfeld did not charge the jury on those issues in the rather unprecise and redundant language that Schuffman requested, the court's final instruction did fairly present the legal theories of the defense. Thus, on the issue of good faith, Judge Weinfeld stated, in part:

> "However misleading or deceptive a plan may be, the use of the mails to execute it does not constitute a crime if the plan was devised in good faith.
>
> * * * * *
>
> The defendant denies any scheme to defraud or any knowledge of such a scheme, and contends that he acted in good faith in selling the whiskey through the Perthshire Company.
>
> * * * * *
>
> If you find that the defendant acted in good faith, he should be found not guilty." (Tr. 1141-42).

With respect to Schuffman's reliance on the advice of Perthshire's counsel, Judge Weinfeld instructed the jury:

> "As part of his defense that he acted in good faith, Schuffman contends that he relied on advice given to him by Andrew Gore, an attorney. He testified that he submitted the brochure and other material sent to purchasers of whiskey to the attorney and was advised by him that it was within the law.
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> * * * * *
>
> However, if a man honestly, and in good faith, seeks advice of a lawyer as to what he may lawfully do, and if he fully and honestly lays all the facts before his counsel, and in good faith honestly follows that advice—relying upon it and believing it to be correct, and only intends that his acts shall be legal, he cannot be convicted of a crime which involves wilful and unlawful intent even if the legal advice that he received was erroneous." (Tr. 1143-44).

As to reckless indifference, Judge Weinfeld's charge followed the classic and repeatedly approved form:

> "Intent to deceive may also exist where one acts with reckless indifference to the truth. Among other ways, the element of knowledge and intent to defraud may be satisfied by proof that the defendant deliberately closed his eyes to what otherwise would have been obvious to him.
>
> Thus, if you find that the defendant acted with a reckless disregard for the truth and a conscious purpose to avoid learning whether statements he made or caused to be made was false, fraudulent or misleading, or omitted to state material facts so that what was stated became fraudulent and misleading, the requirement of knowledge and intent would be satisfied, unless you find that the defendant actually believed the statements were true." (Tr. 1137).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ROBERT B. HEMLEY,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys,
Of Counsel.

Form No. USA-33a-274 (Ed. 9-25-58)

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT B. HEMLEY being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 6th day of February, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Benjamin Golub, Esq.
10 East 40th Street
New York, New York

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Robert B. Hemley

Sworn to before me this

6th day of February, 1976

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977